IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al. Plaintiffs, v. TYSON FOODS, INC., et al. Defendants.	))))))))))	Case No. 4:05-cv-00329-GKF-PJC

DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT ON COUNTS 6 & 10 OF THE SECOND AMENDED COMPLAINT AND INTEGRATED BRIEF IN SUPPORT

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INTRODUCTION

The undersigned Defendants ("Defendants") respectfully move for summary judgment on Plaintiffs' trespass (Count 6) and unjust enrichment (Count 10) claims in the Second Amended Complaint, Dkt. No. 1215 (July 16, 2007) ("SAC"). These claims suffer similar legal and factual infirmities and, as a result, Plaintiffs are unable to satisfy necessary elements of either claim under Oklahoma or Arkansas law.[1] *First*, Plaintiffs' trespass claim fails because Plaintiffs do not, and as a matter of law cannot, have the required "possessory property interest" in the waters where the trespass is alleged to have occurred. *Second*, Plaintiffs' unjust enrichment claim fails as a matter of law because the State of Oklahoma has not made any expenditure that has saved Defendants from a cost or expense that Defendants would otherwise have incurred. *Finally*, both claims must be dismissed because the challenged use of poultry litter is authorized by Oklahoma and Arkansas law. Given this official sanction, Plaintiffs cannot demonstrate *unauthorized* trespass or *unjust* enrichment.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. The Illinois River Watershed ("IRW") comprises approximately 1,069,530 acres,

[1] While Plaintiffs concede their lack of standing to recover for alleged injuries in the State of Arkansas, *see* Dkt. No. 1822 at 2 n.3 (Jan. 8, 2009), they continue to assert standing to raise claims based on conduct throughout the entire IRW, including in Arkansas. *See, e.g.*, SAC ¶¶21-30, 45-63, 97-107; Undisputed Facts ¶1. Where a plaintiff alleges that the discharge of pollutants in the navigable waterways of a "source state" causes injuries in a different "affected state," the Supreme Court has established that the trial court "must apply the law of the State in which the … source is located." *Int'l Paper Co. v. Ouellette, et al.*, 479 U.S. 481, 487 (1987); *Lane v. Champion Int'l Corp.*, 827 F. Supp. 701, 702 n.2 (S.D. Ala. 1993) (applying substantive law of the source state to all state common law claims, including trespass) (citing *Ouellette*, 479 U.S. at 501); *see also Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) ("[T]he Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.") (internal quotations and ellipses omitted). Accordingly, with respect to each of the state law claims discussed herein, Arkansas law governs conduct alleged to occur in Arkansas and Oklahoma law governs conduct alleged to occur in Oklahoma.

located half in Oklahoma (approximately 576,030 acres), and half in Arkansas (approximately 493,500 acres). *See* SAC ¶21; SAC Ex. 1. The IRW encompasses portions of seven counties (three in Arkansas and four in Oklahoma) as well as at least thirteen cities and towns. *See id*.

2. Plaintiffs have not identified specific lands in the IRW in which the State of Oklahoma maintains title, property, or ownership interests that have been physically invaded, injured, or otherwise the subject of a trespass. Plaintiffs have alleged only a generalized "possessory property interest in the water in that portion of the [IRW] located within the territorial boundaries of the State of Oklahoma which runs in definite streams, formed by nature, over or under the surface." SAC ¶119; *see* June 15, 2007 Hearing Tr. at 176:11-22 (Ex. 1).

3. Poultry litter is a widely utilized fertilizer, which provides soil nutrients, increases crop yields and outperforms commercial fertilizers. *See*, *e.g.*, Ex. 2 at 1, 2 ("Poultry Litter is an excellent, low cost fertilizer [that] returns nutrients and organic matter to the soil, building soil fertility and quality."); Ex. 3 at 1 ("Applying animal manure to farmland is an appropriate and environmentally sound management practice [that] recycle[s] nutrients from manure to soil for plant growth and add[s] organic matter to improve soil structure, tilth, and water holding capacity."); Ex. 4 ("[Poultry] litter can be utilized as a fertilizer for pastureland, cropland and hay production [and is] an excellent source of … nitrogen, phosphorus and potassium. In addition, litter returns organic matter and other nutrients to the soil, which builds soil fertility and quality."); Ex. 5 at 31:11-14, 540:19-541:4, 1764:23-1768:9 ("P.I.T."); Peach Dep. at 45:7-10, 126:22-128:9, 136:17-137:24 (Ex. 6); Ex. 7 at 7-8.

4. Oklahoma and its agents recognize poultry litter as an effective fertilizer, and actively encourage and approve of its use. *See*, *e.g.*, 2 O.S. § 10-9.1, *et seq.*; O.A.C. § 35:17-5-1 (enacting poultry litter laws and regulations to "assist in ensuring beneficial use of poultry

waste"); Ex. 8 ("The Oklahoma Litter Market website serves as a communication link for buyers, sellers and service providers of poultry litter."); Ex. 9 (providing a "Fertilizer Value Calculator" to "calculate [the] value of nutrients in [poultry] litter"); Peach Dep. at 79:3-9 ("Oklahoma Conservation Commission teach[es] people how to … apply … and use litter in the IRW") (Ex. 6); Undisputed Facts ¶3 (citing statements by agents of Oklahoma).

5. Arkansas also recognizes litter as an effective fertilizer, and encourages and approves its use. *See, e.g.*, Ark. Code Ann. § 15-20-902 (poultry litter "provides nutrients that are beneficial to plant growth [and] allows the addition of nutrients to the soil at a low cost"); Ark. Code Ann. § 15-20-1102 (enacting poultry litter laws and regulations to "regulate the utilization of poultry litter to protect the area while maintaining soil fertility").

6. Oklahoma and Arkansas authorize and comprehensively regulate the land application of poultry litter within their respective state boundaries. *See* 2 O.S. § 10-9.1 *et seq.*; 2 O.S. § 10-9.16 *et seq.*; 2 O.S. § 20-40, *et seq.*; O.A.C. § 35:17-5-1, *et seq.*; O.A.C. § 35:17-7-1, *et seq.*; Ark. Code Ann. § 15-20-901, *et seq.*; Ark. Code Ann. § 15-20-1101, *et seq.*; ANRC Reg. 1901.1, *et seq.*; ANRC Reg. 2001.1, *et seq.*; ANRC Reg. 2101.1, *et seq.*; ANRC Reg. 2201.1, *et seq*.

7. Every application of poultry litter to land in the IRW must be performed by a registered poultry farmer (Grower) or certified applicator consistent with a nutrient management plan (NMP) *and/or* animal waste management plan (AWMP) approved by agent(s) for the states of Oklahoma or Arkansas. The state-approved poultry litter management plans are specifically tailored to each parcel of land and dictate the time, method, location, and amount of poultry litter that may be applied. Throughout this litigation, agents on behalf of Oklahoma and Arkansas have continued to approve and issue new plans for land application of poultry litter within the IRW. *See* 2 O.S. §§ 10-9.7, 20-48; 2 O.S. § 10.9-16, *et seq.*; O.A.C. § 35:17-5-1, *et seq.*; O.A.C.

§ 35:17-7-1, *et seq.*; Ark. Code Ann. § 15-20-1108(b)(1); Ark. Code Ann. § 15-20-1101, *et seq.*; ANRC Reg. 2201.1, *et seq.*; ANRC Reg. 2101.1, *et seq.*; *see, e.g.*, Exs. 10-17; *see also, e.g.*, Young Dep. at 223:12-17 (Ex. 18); Parrish Dep. at 71:4-79:20, 235:21-236:3 (Ex. 19); Gunter Dep. at 74:6-12 (Ex. 20); Fisher II Dep. at 470:8-471:8, 472:15-473:7 (Ex. 21).

8. Poultry litter is applied in the IRW consistent with Oklahoma and Arkansas laws. *See, e.g.*, Peach Dep. at 37:15-39:4, 75:2-76:10, 90:3-12, 92:25-93:6, 95:20-96:11, 114:14-117:7 (Ex. 6); Thompson Dep. at 16:15-22:25, 31:7-23, 42:13-43:7 (Ex. 22); Strong Dep. at 171:21-173:18 (Ex. 23); Fisher I Dep. at 146:22-149:1 (Ex. 24); Fisher II Dep. at 473:15-23 (Ex. 21); Tolbert Dep. at 160:4-164:17 (Ex. 25); P.I.T. at 1301:6-1303:8, 2002:6-2003:5, 2005:7-16, 2006:12-15 (Ex. 5); Littlefield Dep. at 23:19-21, 43:3-15 (Ex. 26); Phillips Dep. at 63:18-23 (Ex. 27); Traylor Dep. at 11:16-12:11 (Ex. 28); *see also, e.g.*, Exs. 10-17. Plaintiffs have not identified evidence demonstrating that Defendants or non-party farmers and ranchers apply poultry litter in a manner contrary to the specific instructions provided by those States under the comprehensive poultry litter regulations.

9. Plaintiffs have not identified record evidence of any "benefit" that the State of Oklahoma has "involuntarily conferred" upon Defendants. SAC ¶¶141-43; *see* Ex. 29 at No. 2; Ex. 30 at No. 2; Ex. 31 at 33; Ex. 32 at 1-9, 7-7; Ex. 33 at 2; *see also infra* at 20 n.18.

10. There is no record evidence of any expenditure or expenses incurred by the State of Oklahoma that has directly added to the property of Defendants. *See* Undisputed Facts ¶9.

11. There is no record evidence of any expenditure or expenses incurred by the State of Oklahoma that has saved Defendants from a loss or expense that they would have otherwise incurred. *See* Undisputed Facts ¶9.

12. Plaintiffs have not identified record evidence of any specific "costs" that Defendants have "avoided … associated with the management and disposal of poultry wastes … at the expense of and in violation of the State of Oklahoma's rights." SAC ¶¶141-42; *see* Undisputed Facts ¶9.

13. Defendants do not, in fact, incur any direct costs with respect to the management or disposition of poultry litter that results from Growers' poultry raising operations. *See* Undisputed Facts ¶¶14-26.

14. Poultry growers ("Contract Growers" or "Growers") are independent farmers and ranchers who contract with Defendants to raise poultry. *See* Butler Dep. at 118:23-119:2 (Ex. 34); P.I.T. at 1336:12-1339:3, 1374:23-1375:14, 2025:9-15, 2030:7-2032:19, 2035:2-7, 2040:10-24, 2049:8-10 (Ex. 5); Exs. 35-40.

15. Poultry are raised in houses or barns owned by Contract Growers. *See* P.I.T. at 1371:7-11, 1386:6-12, 2030:7-15 (Ex. 5); Anderson Dep. at 203:12-24 (Ex. 41); Exs. 35-40; *see*, *e.g.*, Ex. 35 at TSN22977SOK ¶2(A); Ex. 38 at SIM AG 37096 ¶3(b).

16. Growers typically purchase the bedding material—usually consisting of rice hulls or wood shavings—to place inside the poultry houses or barns to provide a soft and absorbent material on which to raise poultry. *See* Butler Dep. at 239:2-4 (Ex. 34); P.I.T. at 1338:17-1339:3, 2033:2-8 (Ex. 5); Exs. 35-40; *see*, *e.g.*, Ex. 35 at TSN22977SOK ¶2(A); Ex. 38 at SIM AG 37096 ¶3(b).

17. "Poultry litter consists of fecal excrement and … bedding material … and other components such as feathers and soil. Wood shavings, sawdust, and soybean, peanut, or rice hulls are all common" bedding materials. Ex. 4; *see* Butler Dep. at 82:9-25 (Ex. 34).

18. Growers, not Defendants, decide when to clean out poultry litter from their poultry

houses or barns. *See* P.I.T. at 1341:13-17, 1390:8-25, 2023:24-2024:6, 2031:20-23, 2032:9-11 (Ex. 5); Butler Dep. at 78:25-83:4 (Ex. 34).

19. Growers, not Defendants, own the poultry litter generated on their farms. *See* P.I.T. at 1372:2-9, 1376:15-1377:1, 1380:1-6, 2021:23-2022:2, 2033:25-2034:10, 2045:6-18, 2048:14-2049:6 (Ex. 5); Ex. 42 at Hunton Aff. ¶¶4, 8, Pigeon Aff. ¶¶6, 7, Reed Aff. ¶¶7, 8, 11, Saunders Aff. ¶¶5, 6; Exs. 35-40; *see, e.g.*, Ex. 37 at PFIRWP-024054 ¶II(H); Ex. 38 at SIM AG 37099 ¶7.

20. Growers sell, distribute, store or use their poultry litter at their own discretion, subject to applicable state and federal laws and regulations. *See* P.I.T. at 1340:3-1342:17, 1376:15-1377:14, 1390:17-19, 1391:9-16, 1394:7-1395:15, 2023:24-2024:6, 2024:25-2025:15, 2031:24-25, 2032:12-25, 2033:10-23, 2034:9-25, 2045:6-2046:9, 2052:21-2053:14 (Ex. 5); Littlefield Dep. at 53:2-9 (Ex. 26); Butler Dep. at 78:16-24 (Ex. 34); Ex. 42 at Hunton Aff. ¶¶4, 8, Pigeon Aff. ¶¶6, 7, Reed Aff. ¶¶7, 8, Saunders Aff. ¶¶5, 6.

21. If a Grower sells or distributes poultry litter, the Grower, not Defendants, receives and retains the proceeds from the sale or distribution. *See* Butler Dep. at 243:3-17 (Ex. 34); Fisher I Dep. at 317:13-20 (Ex. 24); P.I.T. at 2052:21-2053:14 (Ex. 5); Ex. 42 at Hunton Aff. ¶4, Pigeon Aff. ¶6, Reed Aff. ¶11.

22. The poultry litter laws of Oklahoma and Arkansas regulate the non-party farmers and ranchers who land apply poultry litter, not the poultry integrators with whom the Growers enter into contracts. *See* Gunter Dep. at 78:8-80:18, 152:8-157:1 (Ex. 20); Peach Dep. at 117:8-24, 120:12-122:9 (Ex. 6); Parrish Dep. at 201:2-202:3 (Ex. 19); Littlefield Dep. at 20:20-24:22, 32:7-38:6 (Ex. 26); *see generally* 2 O.S. §§ 10-9.3, 10-9.4, 10-9.5.F(1), 10-9.7, 10-9.7.C, 10-9.17, 10-9.18; Ark. Code Ann. § 15-20-1101, *et seq.*; Ark. Code Ann. §§ 15-20-904, 15-20-1113.

23. The only poultry litter regulation specifically directed towards Defendants is

Oklahoma's rule that poultry integrators may not contract with any Grower who has not completed the State's required program to educate Growers on the appropriate use of their litter. *See* 2 O.S. § 10-9.5.G; Gunter Dep. at 154:9-157:1 (Ex. 20).

24. The Oklahoma and Arkansas poultry litter laws and regulations do not impose on Defendants any financial or legal obligations with respect to the management or disposition of poultry litter that results from Growers' poultry raising operations. *See* Undisputed Facts ¶¶6-7, 22-23.

25. The contracts entered into between the Growers and the poultry integrator Defendants do not infringe on the Growers' ownership and use of the litter, with the exception of provision(s) requiring Growers to comply with all federal, state and local laws and regulations related to the sale, distribution, storage, management or use of poultry litter. *See* P.I.T. at 1340:22-1341:12, 1390:4-7, 2023:24-2024:6 (Ex. 5); Exs. 35-40; *see, e.g.*, Ex. 35 at TSN22977SOK – TSN22978SOK ¶¶2(F), 2(H), 11(G); Ex. 36 at GE 41403 ¶V(A); Ex. 37 at PFIRWP-024052 – PFIRWP-024062 ¶¶II(F), III(A)(9)-(11), VI(A)-(G); Ex. 38 at SIM AG 37096 ¶3(o); Ex. 39 at CM-000001372 ¶3; Ex. 40 at CARTP172228 ¶7.

26. Defendants' contracts with Growers do not impose on Defendants any financial or contractual obligations with respect to the management or disposition of poultry litter that results from Growers' poultry raising operations. *See* Undisputed Facts ¶25.

LEGAL STANDARD

"Summary judgment … is an important procedure 'designed to secure the just, speedy and inexpensive determination of every action.'" *Culp v. Sifers*, 550 F. Supp. 2d 1276, 1281 (D. Kan. 2008) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). Summary judgment is appropriate where "there is no genuine issue as to any material fact and … the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party is entitled to summary

judgment as a matter of law where the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. Where the movant shows the "absence of a genuine issue of material fact, the non-movant may not rest on its pleadings but must set forth specific facts showing a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." *Sierra Club v. Seaboard Farms*, 387 F.3d 1167, 1169 (10th Cir. 2004); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (requiring non-moving party to provide admissible evidence "on which a jury could reasonably find for the plaintiff"); *Matsushita Elec. Indus. v. Zenith*, 475 U.S. 574, 586 (1986) ("[plaintiff] must do more than simply show that there is some metaphysical doubt as to the material facts").

ARGUMENT

I. PLAINTIFFS CANNOT DEMONSTRATE THE REQUIRED ELEMENTS FOR TRESPASS (COUNT 6)

Trespass requires "an actual physical invasion of the real estate of another without the permission of the person lawfully entitled to possession." *Bennett v. Fuller*, 2008 U.S. Dist. LEXIS 58198, *16 (N.D. Okla. July 31, 2008) (Frizzell, J.). Plaintiffs cannot meet this test. *First*, Plaintiffs lack the possessory property interest necessary to support a trespass claim because (i) the Cherokee Nation is the rightful owner and trustee of the property, *and/or* (ii) Oklahoma does not maintain the requisite "actual and exclusive possession" of the public waters alleged to have been invaded. *Second*, Plaintiffs' claim of trespass is inappropriate because poultry litter is applied in the IRW with the express consent, authorization and permission of Oklahoma and Arkansas.

A. Plaintiffs Cannot Demonstrate the Required Possessory Property Interest in the Waters Where the Trespass Allegedly Occurred

As this Court has already held in response to extensive briefing, Plaintiffs' trespass claim is limited to property in which the State of Oklahoma maintains a possessory interest.[2] In response to that ruling, Plaintiffs have narrowed their trespass claim to only "the water in that portion of the [IRW] located within the territorial boundaries of the State of Oklahoma which runs in definite streams, formed by nature, over or under the surface." SAC ¶119; *see* Dkt. No. 1917 at 17-18 (Mar. 10, 2009) (asserting interests in water *only*). This trespass claim fails as a matter of law because Plaintiffs are not the rightful owner of the waters in the Oklahoma portion of the IRW, and further, because the State cannot, as a matter of law, maintain the requisite actual and exclusive possession of such public waters.

1. Oklahoma Is Not the Rightful Owner or Trustee of the Property at Issue

Plaintiffs' trespass claim is not based on the State's interests as a private landowner. In fact, Plaintiffs expressly disclaimed such an argument in Plaintiffs' Response in Opposition to Defendants' Motion for Partial Summary Judgment as to Plaintiffs' Time Barred Claims, Dkt. No. 1917 (Mar. 10, 2009) ("Statute of Limitations Opposition"). *See id.* at 17 ("[t]he State's Trespass Claim Does Not Arise From Private Rights" and should not be characterized as a claim based on the State's "possessory interest in 'government property'—public water—in a manner identical to a private litigant"). Instead, Plaintiffs' revised trespass claim is based on the theory that the State has a sovereign "possessory property interest in the water in that portion of the [IRW] located within the territorial boundaries of the State of Oklahoma which runs in definite streams, formed by nature, over or under the surface." SAC ¶119; *see* Dkt. No. 1917 at 17-18.

[2] *See* June 15, 2007 Hearing Tr. at 176:11-22 ("I am going to [dismiss and] require the plaintiff to replead Count 6 to specifically set forth those properties which they would have standing to assert a trespass claim upon … because clearly the State doesn't have standing to assert trespass over all the lands, biota, et cetera, et cetera, in the IRW or even within the IRW within the State of Oklahoma.") (Ex. 1); *see also* Defs.' Mot. for Partial Judgment As a Matter of Law Based on Pls.' Lack of Standing, Dkt. No. 1076 at 13-16 (Mar. 12, 2007) (citing authority); *infra* at 10-13.

Presumably the State claims to have received ownership of the waters from the federal government upon statehood. But, as Defendants demonstrated in their pending motion to dismiss pursuant to Rule 19 for failure to join a necessary party, the Cherokee Nation—not the State of Oklahoma—is the sovereign owner of the waters of the IRW because Congress transferred that water to the exclusive ownership of the Nation before Oklahoma existed. *See* Dkt. No. 1788 at 4-14 (Oct. 31, 2008). Moreover, Oklahoma expressly disavowed any claim to those waters as a condition of becoming a State. *See id.* at 8-11. Accordingly, the Cherokee Nation—not the State of Oklahoma—is the rightful owner and trustee of the waters in the Oklahoma portion of the IRW. *See* Dkt. No. 1788.[3] Because Plaintiffs lack the asserted interest on which their trespass claim is founded, the claim must be dismissed.

2. Plaintiffs Cannot Demonstrate the "Actual and Exclusive Possession" Necessary to Support a Trespass Claim

Even if the State of Oklahoma had some interest in the waters at issue, Plaintiffs' trespass action would still fail because the State lacks the requisite possessory property interest to pursue such a claim. A trespass claim redresses only injuries to a plaintiff's "*actual and exclusive possession* of the affected property," not injury to more inchoate public trust or common rights. *New Mexico v. Gen. Elec. Co.*, 335 F. Supp. 2d 1185, 1235 (D. N.M. 2004) (emphasis added) (internal citations omitted), *aff'd by* 467 F.3d 1223, 1248 n.36 (10th Cir. 2006).[4] Plaintiffs

[3] *See also* Dkt. No. 1825 (Jan. 20, 2009). Defendants' Rule 19 motion sets forth the basis for the Cherokee Nation's claim to natural resource rights in the IRW. Although the Court need not resolve the merits of the Nation's claim to rule on the Rule 19 motion (because a colorable claim is sufficient for Rule 19), as the Rule 19 motion demonstrates, the Cherokee Nation's claim is undoubtedly correct.

[4] *See* W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 13 at 67 (5th ed. 1984) ("the requirements for recovery for trespass to land under the common law action of trespass were an invasion (a) which interferences with the right of *exclusive possession* of the land"); *id.* ("In the bundle of rights, privileges, powers, and immunities that are enjoyed by an owner of property, perhaps the most important is the right to *exclusive* 'use' of the realty."); Restatement

cannot satisfy this requirement with respect to Oklahoma's public waters.

As an initial matter, there is no question that the State does not, in fact, maintain *actual and exclusive* possession of all of the "water in that portion of the [IRW] located within the territorial boundaries of the State of Oklahoma which runs in definite streams, formed by nature, over or under the surface." SAC ¶119. Indeed, by Plaintiffs' own admission, "[w]ater running in a definite stream, formed by nature over or under the surface not used by riparian owners is *public water* and subject to appropriation *for the benefit and welfare of the people of the state*." Dkt. No. 1917 at 18 (citing 60 O.S. § 60) (emphasis added, in part). As noted above, Plaintiffs have properly disclaimed a trespass claim based purely on *private* landowner interests; rather, they style this as a "public-interest action" based solely on the State's sovereign interests in protecting "public water" in Oklahoma. Dkt. No. 1917 at 17-18; *see supra* at 9. However, the tort of trespass does not protect such public interest claims, even where the State retains a sovereign or *parens patriae* interest. *See, e.g.*, *New Mexico*, 335 F. Supp. 2d at 1231-35, *aff'd* 467 F.3d at 1248 n.36; *Mathes v. Century Alumina Co.*, 2008 U.S. Dist. LEXIS 90087, *28, *35 (D.V.I. Oct. 31, 2008).

(Second) of Torts § 821D cmt. d ("A trespass is an invasion of the interest in the *exclusive possession* of land, as by entry upon it.") (citing *id.* at §§ 157-166) (emphasis added); *Bennett*, 2008 U.S. Dist. LEXIS 58198 at *16 ("[T]respass involves an actual physical invasion of the real estate of another without the permission of the person lawfully entitled to possession."); *Patton v. TPI Petroleum, Inc.*, 356 F. Supp. 2d 921, 930 (E.D. Ark. 2005) ("The law of trespass protects rights and interests in land … includ[ing] the right to *exclusive possession* and the right of physical integrity of the land.") (emphasis added); *Williamson v. Fowler Toyota, Inc.*, 956 P.2d 858, 862 (Okla. 1998) (same); *see also, e.g.*, *Browning v. MCI, Inc.* (*In re WorldCom, Inc.*), 546 F.3d 211, 218 (2d Cir. 2008) ("Trespass law protects a person's *exclusive possessory interest* in property.") (citing *Prosser and Keeton on Torts* § 13 at 67 (5th ed. 1984)) (emphasis added); *Morgan v. Barry*, 12 Fed. Appx. 1, 4 (D.C. Cir. 2000) ("The tort of trespass … is the intentional intrusion of a person or thing upon property that invades and disrupts the owner's *exclusive possession* of that property.") (emphasis added) (internal citations omitted).

It is well-established that the "sovereign" or "*parens patriae*" interest that Plaintiffs invoke is insufficient to support a claim of trespass. In *New Mexico v. General Electric Co.*, the United States District Court for the District of New Mexico rejected an identical trespass claim pressed by private counsel on behalf of the Attorney General of New Mexico. *See New Mexico*, 335 F. Supp. 2d at 1231-35. There, as here, New Mexico sought to redress water pollution through a trespass claim, asserting "that the State has 'proprietary interests' in its natural resources; that the State is the proper party 'in its role as public trustee'; and 'has a sovereign interest in its water resources' making it 'the proper party to pursue the claims of its citizens in its role as parens patriae' in bringing a trespass action for actual damage to the public's water supply." *Id.* at 1232. The district court rejected New Mexico's arguments: "Absent the pleading of an *exclusive* possessory legal interest … Plaintiffs cannot maintain a common-law cause of action for trespass as against those who have allegedly contaminated the public's [natural resources]." *Id.* at 1233-34 (emphasis added). Furthermore, the court specifically rejected New Mexico's asserted "proprietary," "sovereign," "public trustee," and "*parens patriae*" interests as falling "outside the scope of the law's protection traditionally afforded to private landowners' right of *exclusive possession* by the law of trespass." *Id.* (emphasis added). The Tenth Circuit affirmed, concurring fully with the district court's reasoning that New Mexico lacked the appropriate exclusive possessory interest, "a necessary requisite to maintaining a trespass action." *New Mexico*, 467 F.3d at 1248 n.36 (citing *Schwartzman, Inc. v. Atchison, Topeka & Santa Fe Ry.*, 857 F. Supp. 838, 844 (D. N.M. 1994)).[5]

[5] Similarly, in *Mathes*, the court dismissed a territorial government's interests in public waters as insufficient to support a trespass claim alleging natural resource contamination:

> The tort of trespass does not lie, under Virgin Islands law, when the only interest invaded is to water. Nor does guardianship of the public trust give the

New Mexico is particularly instructive here, as Plaintiffs premise their trespass claim upon the same asserted proprietary, sovereign, public trust, and *parens patriae* interests in public waters that the Tenth Circuit and District of New Mexico expressly rejected as "fall[ing] outside the scope of the law's protection traditionally afforded to private landowners' right of *exclusive possession* by the law of trespass." *New Mexico*, 335 F. Supp. 2d at 1234, *aff'd by* 467 F.3d at 1248 n.36. Because Plaintiffs cannot demonstrate an appropriate possessory property interest in the subject of their trespass claim, summary judgment is appropriate as to Count 6.

B. There Is No Trespass Because the Alleged Trespass-Causing Activity Is Consented To and Authorized By Law

Summary judgment is further warranted with respect to Plaintiffs' trespass claim because the alleged trespass-causing activity is both authorized and consented to by the States of Oklahoma and Arkansas. Plaintiffs contend that every litter application in the IRW necessarily leads to contamination of the waters of the state (the alleged trespass).[6] While Defendants vigorously dispute that contention,[7] it is the logical premise on which this Court should evaluate Plaintiffs' trespass claim. But, under Plaintiffs' own logic—that the alleged trespass necessarily

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> Government of the Virgin Islands sufficient possessory interest in any water or land to maintain a trespass action.

Mathes, 2008 U.S. Dist. LEXIS 90087 at *28 (citing *New Mexico*, 467 F.3d at 1248); *id.* at 35 ("Because guardianship of the public trust does not rise to the level of possession necessary to maintain an action in trespass, the trespass claim is dismissed.").

[6] *See, e.g.*, Dkt. 1917 at 8 (arguing that every litter application causes environmental damages); Ex. 43 at No. 9 (alleging that "each poultry grower operation … is a source of contamination"); Ex. 30 at No. 7 (describing the undifferentiated application of litter as a CERCLA release); Ex. 44 at 2 Nos. 2-3 (describing every application of poultry litter in the IRW as a release or threatened release).

[7] Indeed, on this point, Plaintiffs' statements are at war with themselves. As noted above, the agents of the State of Oklahoma (including Attorney General Edmondson) have repeatedly said that poultry litter is a safe and effective fertilizer when used according to the litter management plans Oklahoma issues. *See* Undisputed Facts ¶4; *see also* Judgment of the United States Court of Appeals for the Tenth Circuit, Dkt. No. 2044 at 13 (May 13, 2009) ("the record indicates that the land-application of poultry litter is a well-established farming practice").

follows from every litter application of poultry litter—trespass liability cannot lie because both Oklahoma and Arkansas expressly authorize, permit and invite such land applications of poultry litter. *See* Restatement (Second) of Torts § 158 cmt. e ("Conduct which would otherwise constitute a trespass is not a trespass if it is privileged. Such a privilege may be derived from the consent of the possessor, or may be given by law because of the purpose for which the actor acts or refrains from acting.") (internal citations omitted). In fact, poultry litter application in the IRW may be performed *solely* by registered Growers or state-certified applicators consistent with nutrient management plans (NMPs) and/or animal waste management plan (AWMPs) issued and approved by agent(s) for the states of Oklahoma or Arkansas. *See* Undisputed Facts ¶¶6-7; *see, e.g.*, Exs. 10-17. Absent some evidence tying the injuries Plaintiffs allege to specific applications of poultry litter made in violation of those rules, plans or permits, there can be no trespass.

It is blackletter law that there can be no trespass where the allegedly invasion-causing conduct was either authorized by law or consented to by the land owner.[8] As the Restatement (Second) of Torts explains, a person acting pursuant to "[a] duty or authority … created by legislative enactment" cannot be held liable for the invasion of land in the possession of another. Restatement (Second) of Torts § 211.[9] This rule precludes trespass liability for any activity

[8] This common-law rule applies in all contexts in both Arkansas and Oklahoma. *See*, *e.g.*, Ark. Code Ann. § 5-39-305(c)(2), (4), (5) (no criminal trespass on land where invited, authorized or land made open to the public); *United Food & Commercial Workers Int'l Union v. Wal-Mart Stores, Inc.*, 120 S.W.3d 89, 95 (Ark. 2003) (Brown, J. concurring in part and dissenting in part) ("'A trespasser is a person who goes upon the premises of another without permission and without an invitation, express or implied.'") (quoting Arkansas Model Civil Jury Instruction 1107); *Fowler*, 956 P.2d at 862 ("[A] trespasser is one who enters upon the property of another without any right, lawful authority, or express or implied invitation, permission, or license….").

[9] *See id.* at cmt. a ("The duty or authority dealt with in this Section may be created or conferred by statute, ordinance, or order enacted or made in pursuance of legislative action."); *id.* at cmt. c ("The legislative duty or authority carries with it a privilege to enter land in the possession of

"which is done or maintained under the express authority of a statute." C*arson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 888 (9th Cir. 2001) (en banc). Similarly, where a landowner authorizes the allegedly invading conduct, there can be no trespass. Again, as the Restatement explains, "[o]ne who effectively consents to conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or for harm resulting from it." Restatement (Second) of Torts § 892A(1); *see Butler v. Pollard*, 800 F.2d 223, 226 (10th Cir. 1986) ("Consent from the owner of land is a valid defense to an action of trespass for acts done within the scope of the license.") (citing *Antonio v. General Outdoor Advertising Co.*, 414 P.2d 289, 291 (Okla. 1966)).[10]

Plaintiffs' trespass claim here fails because the challenged applications of poultry litter are both authorized by law and consented to by the alleged property owner asserting a claim of trespass. Oklahoma and Arkansas expressly authorize the land application of poultry litter in the IRW. *See* Undisputed Facts ¶¶4-7; *see, e.g.*, Exs. 10-17. The states regulate every aspect of the activity, dictating who may apply litter, with what training and licensing, where they may do so, under what conditions, and in what amounts for each individual parcel of land. *See* Undisputed Facts ¶¶6-7; *see, e.g.*, Exs. 10-17. For example, Growers must register with the Oklahoma State Board of Agriculture, the Oklahoma Department of Agriculture, Food and Forestry ("ODAFF"), or the Arkansas Natural Resource Commission ("ARNC"),[11] and maintain records detailing the

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another if it is reasonably necessary to do so in order to perform the duty or exercise the authority. … Such a privilege of entry may also arise by implication."); *id.* at cmt. d ("Whether the actor is a public official or a private person is immaterial to the existence of the privilege."); *see also* Dkt. No. 2033 at 17-20 (May 11, 2009) (application of exception to nuisance law).

[10] *See also* Restatement (Second) of Torts § 892 ("Consent is willingness in fact for conduct to occur. It may be manifested by action or inaction and need not be communicated to the actor."); *id.* § 167 ("The rules stated in §§ 892-892D as to the effect of consent to the actor's conduct apply to entry or remaining on land.").

[11] *See* 2 O.S. §§ 10-9.3, 10-9.4, 20-44(A)(1); Ark. Code Ann. § 15-20-904(b); ANRC Reg.

disposition of poultry litter generated from their operations.[12] Additionally, Growers using litter must obtain a nutrient management, animal waste management, *and/or* poultry litter management plan(s) from ODAFF or ARNC, specifically tailored to the land and the intended use of the poultry litter.[13] All other applications in the IRW must be made by certified applicators pursuant to state-approved plans.[14] Thus, litter may be land-applied in the IRW *only* pursuant to state-issued and approved waste management plans, *solely* by registered-Growers or state-certified applicators. Absent specific evidence of non-compliance with "the requirements imposed by the[se] legislative enactment[s]," performance of this statutorily authorized activity is protected from tort liability in trespass. Restatement (Second) of Torts § 211 cmt. i.

The Ninth Circuit *en banc* reached precisely this conclusion under closely analogous circumstances. In *Carson Harbor*, the plaintiff landowner brought a trespass claim seeking to recover response costs from upstream public water utilities, which, it alleged, had discharged storm water containing lead onto the plaintiff's property. *See Carson Harbor*, 270 F.3d at 869-70. The district court granted the utilities summary judgment, concluding that "[b]ecause [plaintiff] failed to show that the [utilities] violated the NPDES permits … any pollutants discharged into the storm water were permissible." *Id.* at 870 (citing *Carson Harbor Vill., Ltd. v.*

1901.1, *et seq.*; *see also* Parrish Dep. at 27:10-28:8 (Ex. 19).

[12] *See* 2 O.S. §§ 10-9.7.C(7), 20-48(D); Ark. Code Ann. § 15-20-1108(c)(3); *see also* Parrish Dep. at 140:18-141:13 (Ex. 19).

[13] *See* 2 O.S. §§ 10-9.7, 20-48; Ark. Code Ann. § 15-20-1108(b)(1); ANRC Reg. 2201.1, *et seq.*; *see also* Young Dep. at 223:12-17 (Ex. 18); Parrish Dep. at 71:4-79:20, 235:21-236:3 (Ex. 19); *see, e.g.*, Exs. 10-17.

[14] *See* 2 O.S. § 10.9-16, *et seq.*; Ark. Code Ann. § 15-20-1101, *et seq.*; ANRC Reg. 2101.1, *et seq.*; *see also* Gunter Dep. at 74:6-12 (Ex. 20). In Arkansas, both the certified applicator and landowner are required to maintain records relating to the poultry litter application for five years. Moreover, in Oklahoma, the certified applicators are required to file a report with the state identifying the source of the litter and the specific location(s), date(s) and amount(s) the litter was applied. *See* 2 O.S. § 10-9.18.

Unocal Corp., 990 F. Supp. 1188, 1197 (C.D. Cal. 1997)). The Ninth Circuit *en banc* affirmed. Relying on California's codification of the common law rule, it concluded that the plaintiff could not recover through any of its state law tort claims, including trespass, for any pollution that reached its land after having been discharged in compliance with the utilities' NPDES permits. *See Carson Harbor*, 270 F.3d at 888. Because the plaintiff had failed to adduce specific evidence that the contaminants resulted from violations of those permits, summary judgment was appropriate. *See id.*

The same reasoning and result applies in this case. Poultry litter is applied to land in the IRW solely pursuant to litter management plans approved and issued in accordance with the requirements and regulations imposed under state law. *See* Undisputed Facts ¶¶6-8. Because the States specifically authorize and approve the application of poultry litter, the allegedly trespass-causing conduct is both consented to and authorized by law. Plaintiffs have made no effort to disaggregate appropriate from inappropriate litter applications, nor identified record evidence of poultry litter applications made in violation of the states' comprehensive litter laws and regulations. *See* Undisputed Facts ¶8; *see, e.g.*, Fisher I Dep. at 146:22-149:1 (in four years of investigation in the IRW, Plaintiffs' field investigators failed to document any violations of state litter laws) (Ex. 24); *see also* Dkt. No. 1925 at 8 n.18 (Mar. 23, 2009).[15] Indeed, quite the

[15] To the contrary, the record reflects that litter application in the IRW complies with the standards established by state law. *See* Undisputed Facts ¶8; *see, e.g.*, Thompson Dep. at 16:14-22:25, 31:7-23, 42:13-43:7 (Oklahoma DEQ has not found that the use of poultry litter has caused pollution to the waters of the state or violated the law) (Ex. 22); Peach Dep. at 37:15-39:4, 75:11-76:10, 90:3-12, 96:4-11, 114:14-117:7 (Oklahoma Secretary and Commissioner of Agriculture is not aware of any violation by Defendants or Growers) (Ex. 6); *id.* at 75:2-16, 95:20-96:3 (farmers in the IRW are "concerned with the environment" and "obey applicable statutes and regulations"); Fisher II Dep. at 473:15-23 (not aware of any application in violation of state-approved NMP or AWMP) (Ex. 21); P.I.T. at 1301:6-1303:8 (not aware of any widespread non-compliance or violations of Arkansas laws) (Ex. 5); *id.* at 2006:12-15 (not aware of any growers discharging poultry wastes into Oklahoma waters); Littlefield Dep. at 23:19-21

opposite, Plaintiffs have asserted repeatedly in the context of this litigation that each and every application of poultry litter, without regard to whether it complies with a state-issued and approved management plan, causes the complained-of injury. *See supra* at 13 n.6. Because this conduct is undertaken pursuant to, and in compliance with, state laws and regulations, a trespass claim cannot lie. Accordingly, Count 6 must be dismissed in its entirety.[16]

* * *

In sum, Plaintiffs' trespass claim (Count 6) seeks hundreds of millions of dollars in damages for conduct that the States of Oklahoma and Arkansas to this day authorize, regulate, license and approve. The statutes regulating the use of poultry litter represent Oklahoma's and Arkansas' best judgment as to the appropriate balance between the agricultural and economic benefits of poultry litter and sound environmental protections. Plaintiffs' allegations improperly seek to displace that judgment. *See Piggott v. Eblen*, 366 S.W.2d 192, 196 (Ark. 1963) ("It is not the function or within the power of this court to invade the constitutional authority of the legislature…."); *see also E. I. Du Pont de Nemours Powder Co. v. Dodson*, 150 P. 1085, 1087 (Okla. 1915) ("when the Legislature allows or directs that to be done which would otherwise be a nuisance, it must be presumed that the Legislature is the proper judge of what the public good requires"). Because Plaintiffs cannot demonstrate that the damages they allege were caused by

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(no "bad actors" among farmers he inspects) (Ex. 26); Phillips I Dep. at 63:18-23 (not aware of growers violating waste management rules) (Ex. 27); *see also, e.g.*, Exs. 10-17. Lacking evidence of specific violations, Plaintiffs attempt to rely solely upon alleged violations of the general anti-pollution provisions of Oklahoma poultry litter laws and environmental statutes listed in Counts 7 and 8 of Plaintiffs' SAC. However, as detailed in Defendants' Joint Motion for Summary Judgment on Counts 7 & 8, Plaintiffs' reliance on these statutes is misplaced. See Dkt. No. ___, (May 18, 2009).

[16] The Court previously inquired as to the scope of the "authorized by law" exception. *See* July 5, 2007 Hearing Tr. at 48:8-50:11, 50:21-51:3, 61:19-62:18 (Ex. 45). As detailed in a separate summary judgment filing, the rule plainly requires dismissal of Plaintiffs' entire claim, not just the demand for injunctive relief. *See* Dkt. No. 2033 at 20-21 n.22.

the application of poultry litter in violation of the rules and field-specific plans issued by the States, summary judgment is appropriate with respect to Count 6 in its entirety.

II. PLAINTIFFS CANNOT DEMONSTRATE THE REQUIRED ELEMENTS OF THEIR UNJUST ENRICHMENT CLAIM (COUNT 10)

Unjust enrichment requires "'enrichment to another coupled with a resulting injustice.'" *County Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1518 (10th Cir. 1991) (quoting *Teel v. Pub. Serv. Co.*, 767 P.2d 391, 398 (Okla. 1985)); *see Westside Galvanizing Servs. v. Georgia-Pac. Corp.*, 921 F.2d 735, 739 (8th Cir. 1990) ("Before there can be unjust enrichment, a party must have received something of value, to which he was not entitled and which he must restore.") (*citing Dews v. Halliburton Indus., Inc.*, 708 S.W.2d 67, 69 (Ark. 1986)). Here, Plaintiffs can show neither: *first*, there is no evidence of enrichment; *second*, a benefit conferred is not *unjust* when expressly authorized by law.

A. The State of Oklahoma Has Not Incurred Any Expense that Has Enriched Defendants

In order to show enrichment, Plaintiffs must demonstrate some cost imposed on the State of Oklahoma that resulted in a benefit conferred on Defendants. *See County Line*, 933 F.2d at 1518; *El Paso Prod. Co. v. Blanchard*, 269 S.W.3d 362, 372 (Ark. 2007) ("[t]o find unjust enrichment, a party must have received something of value"). Plaintiffs can show neither cost nor benefit.

First, Plaintiffs cannot demonstrate a legally sufficient cost associated with any conduct alleged to have occurred in Arkansas.[17] Plaintiffs neither allege that the State of Oklahoma bore some cost out of pocket, *see* SAC ¶¶139-146, nor have Plaintiffs identified any evidence, in relation to this claim of unjust enrichment, to show that the State incurred costs associated with

[17] As noted *supra*, Arkansas law governs conduct occurring in that state. *See supra* at 1 n.1.

the removal of poultry litter or otherwise spent monies to clean up alleged contamination, *see* Undisputed Facts ¶¶9-12.[18] Instead, Plaintiffs allege the theory that has come to be known as a "pollution easement," specifically that Defendants have caused "cost to the lands and waters

[18] To address this failing, Plaintiffs may invoke certain alleged CERCLA response costs as evidence to satisfy their burden of proof. However, reliance on such costs would be improper because Plaintiffs' requested recovery is wholly duplicative of the remedy sought under Counts 1 and 2 (CERCLA). *See infra* at 23-24; *Harvell v. Goodyear Tire & Rubber Co.*, 164 P.3d 1028, 1035 (Okla. 2006) ("Where the plaintiff has an adequate remedy at law, the court will not ordinarily exercise its equitable jurisdiction to grant relief for unjust enrichment.").

Moreover, as detailed in Defendants' Joint Motion for Summary Judgment on Counts 1 and 2 ("Defendants' CERCLA Motion"), Dkt. No. 1872 (Feb. 18, 2009), the costs Plaintiffs previously identified are not recoverable costs because they were not incurred by the State as a result of Defendants' alleged conduct. Rather, the costs Plaintiffs have identified are general programs that exist independent of the allegations of this lawsuit. *See* Dkt. No. 1925 at 6 n.14; *see also* Dkt. No. 2033 at 23-25 ("Free Public Services Doctrine bars public entities from recovering through litigation the costs of general tax-supported public services").

Importantly, Plaintiffs recently offered several 30(b)(6) witnesses to comprehensively catalog the costs the State has incurred. *See* Smithee Dep. (Ex. 46); Parrish II Dep. (Ex. 47); Phillips II Dep. (Ex. 48). But none of these witnesses were able to identify any form of recoverable response costs incurred by the State. Derek Smithee, testifying on behalf of the Oklahoma Water Resources Board and the Oklahoma Department of Environmental Quality, limited his testimony to the same categories of costs set forth in Plaintiffs' Response in Opposition to Defendants' CERCLA Motion, Dkt. No. 1913 (Mar. 9, 2009). *See* Dkt. No. 1913 at Exs. 6 & 7 (Smithee & Duncan Declarations) (monitoring and sampling programs); Smithee Dep. at 90:15-93:18, 105:3-106:12 (same, except for withdrawal of certain items) (Ex. 46). Daniel Parrish, testifying on behalf of the Oklahoma Department of Agriculture, Food and Forestry ("ODAFF"), identified as response costs the expenses ODAFF has incurred by performing its statutory duty to enforce the Oklahoma Registered Poultry Feeding Operations Act, 2 O.S. § 10-9.1 *et seq.*; O.A.C. § 35:17-5-1 *et seq.*, and the Oklahoma Poultry Waste Applicators Certification Act, 2 O.S. § 10-9.16 *et seq.*; O.A.C. § 35-17-7-1 *et seq*. *See* Parrish II Dep. at 8:10-14, 18:14-23, 60:24-61:8 (Ex. 47). Finally, Shanon Phillips, testifying on behalf of the Oklahoma Conservation Commission ("OCC"), identified grants issued by the OCC to fund a portion of more than 15 different general programs related to the IRW. *See* Phillips II Dep. at 8:2-9:5, 12:6-24 (Ex. 48). However, Plaintiffs' allegations with respect to these costs are insufficient as a matter of law because the costs of these programs were not incurred as a result of Defendants' alleged conduct in the IRW. *See* Dkt. No. 1925 at 6 n.14. To the contrary, these statewide programs were initiated and run without any reference to Defendants' alleged conduct in the IRW. *See, e.g.*, Smithee Dep. at 51:9-25, 53:4-54:4, 76:12-77:9, 110:3-112:19 (Ex. 46); Ex. 49 at 5-7, App. B; Ex. 50 at vii-viii, 24-27; Parrish II Dep. at 8:10-14, 18:14-23, 60:24-61:8 (Ex. 47); Phillips II Dep. at 50:23-52:6, 64:18-65:15 (describing the grants in question as funding an outdoor classroom, Porta-Potties, trash bags, signage and education, among other items) (Ex. 48). Moreover, the recovery of such costs is flatly prohibited under the Free Public Services Doctrine. *See* Dkt. No. 2033 at 23-25.

comprising the IRW and … expense [to] the State of Oklahoma's rights." SAC ¶141; *Marmo v. Tyson Fresh Meats*, 457 F.3d 748, 756 (8th Cir. 2006). However, no court has ever recognized a pollution easement theory under Arkansas law. Instead, Arkansas courts have focused on the injury that the alleged pollution has caused to the plaintiff. *See Felton Oil Co. L.L.C. v. Gee*, 182 S.W.3d 72 (Ark. 2004). The Eighth Circuit has held that it is inappropriate for a federal court to read a "pollution easement" theory into state law. *See Marmo*, 457 F.3d at 755-56. The Eighth Circuit's approach controls the question of whether to read a "pollution easement" theory into Arkansas law, as federal courts defer on questions of state law "to the interpretation of the Court of Appeals for the Circuit in which the State is located." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 16 (2004); *Daniels v. Williams*, 474 U.S. 327, 341-42 (1986) (same).

Second, Plaintiffs cannot demonstrate a corresponding benefit to Defendants sufficient to support a claim for unjust enrichment under either Arkansas or Oklahoma law. Again, Plaintiffs do not allege that Oklahoma added directly to Defendants' property; instead, Count 10 rests on Plaintiffs' claim that Defendants unjustly avoided the costs of disposal of poultry litter. *See* SAC ¶¶141-42. Some states have recognized such a "cost avoidance" theory, *see* Restatement of Restitution § 1 cmt. b, but Arkansas is not among them. Indeed, the only reference to the cost avoidance theory articulated in the Restatement in any Arkansas case appears in the *dissent* in *Vernon v. McEntire*, 356 S.W.2d 13, 16 (Ark. 1962). Instead, Arkansas laws are clear that the defendant affirmatively "must have received something of value." *El Paso*, 269 S.W.3d at 372; *see Westside Galvanizing*, 921 F.2d at 740 ("[A] party must have received something of value, to which he was not entitled and which he must restore."); *Colonia Ins. Co. v. City Nat'l Bank*, 13 F. Supp. 2d 891, 900 (W.D. Ark. 1998) (same).

Oklahoma courts have recognized negative unjust enrichment. *See County Line*, 933 F.2d at 1518 ("[plaintiffs] must, at minimum, show either an expenditure adding to the property of another or one that 'saves the other from expense or loss'") (quoting *McBride v. Bridges*, 215 P.2d 830, 832 (Okla. 1950)). But even then, such a claim requires more than allegations that the defendant might have paid more in a different factual scenario. Rather, the plaintiff must show that the defendant had "an affirmative requirement or duty" to take a certain action, and that the plaintiff's expenditure was the but-for cause that alleviated the defendant of the need to comply with that duty. *Burlington N. & Santa Fe R.R. v. Spin-Galv*, 2004 U.S. Dist. LEXIS 30999, *20 (N.D. Okla. Oct. 5, 2004) (plaintiff must show "an affirmative requirement or duty … that would have been performed by the Defendant but for the Plaintiff's actions"); *see County Line*, 933 F.2d at 1518 ("[Plaintiffs] must … show … an expenditure … that 'saves the other from expense or loss'") (quoting *McBride*, 215 P.2d at 832). Here, however, Defendants do not incur any costs, *see* Undisputed Facts ¶13, nor have any "affirmative requirement or duty" with respect to poultry litter under either the terms of their contracts with Growers, *see* Undisputed Facts ¶¶25-26,[19] or under Oklahoma and Arkansas poultry litter laws, *see* Undisputed Facts ¶¶22-24. Indeed, Growers own the poultry litter that results from the growing process and fully control every aspect of the management, sale, distribution, storage or use of the product. *See* Undisputed Facts ¶¶14-21.[20] Consistent with these facts, Arkansas and Oklahoma laws place responsibility

[19] Certainly, some Defendants' contracts require Growers to comply with applicable state laws and regulations. *See* Undisputed Facts ¶25. But provisions such as these do not demonstrate any control, ownership or duty with respect to the Grower's poultry litter. *See Concrete Sales & Servs., Inc. v. Blue Bird Body*, 211 F.3d 1333, 1339 (11th Cir. 2000); *Jordan v. S. Wood Piedmont*, 805 F. Supp. 1575, 1580 (S.D. Ga. 1992).

[20] The undisputed record is clear that Defendants do not participate in the Growers' sale, distribution, storage, management or use of poultry litter. *See* Undisputed Facts ¶¶14-21. Growers, not Defendants, typically purchase the bedding material used for raising poultry and decide when to clean out the resulting litter from their poultry houses or barns. *See* Undisputed

for poultry litter *only* on the farmers and ranchers who apply poultry litter, not Defendants. *See* Undisputed Facts ¶¶22-24. Thus, regardless of what cost Oklahoma incurred, it did not save Defendants from any legal obligation to prevent Growers from applying poultry litter in accordance with their state-issued permits and plans.

Third, Plaintiffs allegations of unjust enrichment should be dismissed as speculative and duplicative. Oklahoma courts have discretion whether to entertain such claims, and "[w]here the plaintiff has an adequate remedy at law, [they] will not ordinarily exercise [their] equitable jurisdiction to grant relief for unjust enrichment." *Harvell*, 164 P.3d at 1035; *see also County Line*, 933 F.2d at 1518 (denying recovery where "the benefit … conferred … is speculative at best"). Here, Plaintiffs assert that "no other remedy at law … can adequately compensate the State of Oklahoma for the entirety of the loss and damages it has suffered." SAC ¶146. Yet, Plaintiffs have not identified any damages that are unique to Count 10. *See* Undisputed Facts ¶¶9-12; *supra* at 20 n.18. Specifically, they have not articulated any expert opinion to support a restitution or disgorgement award independent of their general damages claims. *See* Undisputed Facts ¶¶9-12. The recovery Plaintiffs seek under this claim thus appears wholly duplicative of the recovery sought under other claims. Because double recovery through an unjust enrichment claim is prohibited,[21] this claim has no independent life and should be dismissed.

Facts ¶¶14-18; *see also* Dkt. No. 2044 at 4 ("the farmers own and manage their own poultry-growing operations"). Growers, not Defendants, own the resulting poultry litter. *See* Undisputed Facts ¶19. Growers, not Defendants, determine whether, when and how to sell, distribute, store or use the poultry litter in accordance with applicable laws and regulations, *see* Undisputed Facts ¶20, and retain all proceeds from the sale or distribution of poultry litter, *see* Undisputed Facts ¶21. *See also* Dkt. No. 2044 at 4 ("The farmers then use the 'poultry litter' … as fertilizer on their fields and often sell or barter it to others."). Growers using their own litter as fertilizer determine the time, method, location, and amount of poultry litter to be applied consistent with their field-specific, state-approved litter management plans. *See* Undisputed Facts ¶¶8, 20.

[21] *See, e.g., N.C. Corff Partnership, Ltd. v. OXY U.S.A., Inc.*, 929 P.2d 288, 295 (Okl.App. 1996).

B. Any Benefits Conferred Upon Defendants Cannot Constitute *Unjust* Enrichment Because the Benefits Are Expressly Authorized by Oklahoma and Arkansas Law

Separately, Count 10 fails because the alleged benefits conferred are expressly authorized by Oklahoma and Arkansas law. A party that merely accepts the benefits afforded to it by existing law cannot be found to have been "unjustly enriched." *See Harvell*, 164 P.3d at 1035 n.33 ("One is not unjustly enriched, however, by retaining benefits involuntarily acquired which law and equity give him ….") (citing *McBride*, 215 P.2d at 832); *Westside Galvanizing*, 921 F.2d at 740 ("Under Arkansas law, 'one who is free from fault cannot be held to be unjustly enriched merely because he has chosen to exercise a legal or contract right.'") (quoting *Whitley v. Irwin*, 465 S.W.2d 906, 910 (Ark. 1971)); *Colonia*, 13 F. Supp. 2d at 900 ("Arkansas law is clear on the issue that in the realm of unjust enrichment, the word 'unjust' means 'unlawful.' 'One is not unjustly enriched by receipt of that to which he is legally entitled.'") (quoting *Halvorson v. Trout*, 527 S.W.2d 573, 577 (Ark. 1975)).

At bottom, Plaintiffs allege that the land application of poultry litter has "unjustly enriched" Defendants. SAC ¶¶139-46. But, what is in fact manifestly unjust is for the State of Oklahoma to issue plans which tell each farmer how much litter should be applied to each unique parcel of property, and then bring suit alleging that actions taken in strict conformity with Oklahoma's instructions are unlawful. *See* Undisputed Facts ¶¶6-8; *supra* at 13-19.[22] There is no enrichment, and certainly not *unjust* enrichment. Count 10 must therefore be dismissed.

[22] Plaintiffs have asserted repeatedly that *every* application of poultry litter to land in the IRW is a source of contamination—even where expressly authorized by Oklahoma and Arkansas laws, regulations and state-approved litter management plans. *See supra* at 13 n.6. Nevertheless, even were Plaintiffs to limit their allegations of unjust enrichment to apply *only* to conduct performed in violation of Oklahoma and Arkansas law, the claim must still fail because—as detailed previously herein—Plaintiffs have not identified record evidence substantiating any violations of poultry litter laws and regulations, or tied their unjust enrichment claim to those specific violations.

CONCLUSION

For the foregoing reasons, summary judgment is appropriate, in whole or in part, as to Plaintiffs' trespass and unjust enrichment claims under Counts 6 and 10, respectively.

Respectfully submitted,

BY: ____*/s/ Jay T. Jorgensen*_____

Thomas C. Green
Mark D. Hopson
Jay T. Jorgensen
Gordon D. Todd
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005-1401
Telephone: (202) 736-8000
Facsimile: (202) 736-8711

-and-

Robert W. George
Vice President & Associate General Counsel
Tyson Foods, Inc.
2210 West Oaklawn Drive
Springdale, Ark. 72764
Telephone: (479) 290-4076
Facsimile: (479) 290-7967

-and-

Michael R. Bond
KUTAK ROCK LLP
Suite 400
234 East Millsap Road
Fayetteville, AR 72703-4099
Telephone: (479) 973-4200
Facsimile: (479) 973-0007

-and-

Patrick M. Ryan, OBA # 7864
Stephen L. Jantzen, OBA # 16247
RYAN, WHALEY & COLDIRON, P.C.
119 N. Robinson
900 Robinson Renaissance

Oklahoma City, OK 73102
Telephone: (405) 239-6040
Facsimile: (405) 239-6766

ATTORNEYS FOR TYSON FOODS, INC.; TYSON POULTRY, INC.; TYSON CHICKEN, INC; AND COBB-VANTRESS, INC.

BY: /s/*James M. Graves*

(SIGNED BY FILING ATTORNEY WITH PERMISSION)

Woodson W. Bassett III
Gary V. Weeks
James M. Graves
K.C. Dupps Tucker
BASSETT LAW FIRM
P.O. Box 3618
Fayetteville, AR 72702-3618
Telephone: (479) 521-9996
Facsimile: (479) 521-9600

-and-

Randall E. Rose, OBA #7753
George W. Owens
OWENS LAW FIRM, P.C.
234 W. 13th Street
Tulsa, OK 74119
Telephone: (918) 587-0021
Facsimile: (918) 587-6111

ATTORNEYS FOR GEORGE'S, INC. AND GEORGE'S FARMS, INC.

BY: */s/ A. Scott McDaniel*

(SIGNED BY FILING ATTORNEY WITH PERMISSION)

A. Scott McDaniel, OBA #16460
Nicole M. Longwell, OBA #18771
Philip D. Hixon, OBA #19121
MCDANIEL, HIXON, LONGWELL & ACORD, PLLC
320 South Boston Ave., Ste. 700
Tulsa, OK 74103
Telephone: (918) 382-9200
Facsimile: (918) 382-9282

-and-

Sherry P. Bartley
MITCHELL, WILLIAMS, SELIG,
GATES & WOODYARD, PLLC
425 W. Capitol Avenue, Suite 1800
Little Rock, AR 72201
Telephone: (501) 688-8800
Facsimile: (501) 688-8807

ATTORNEYS FOR PETERSON FARMS, INC.

BY: */s/ John R. Elrod*

(SIGNED BY FILING ATTORNEY WITH PERMISSION)

John R. Elrod
Vicki Bronson, OBA #20574
P. Joshua Wisley
CONNER & WINTERS, L.L.P.
211 East Dickson Street
Fayetteville, AR 72701
Telephone: (479) 582-5711
Facsimile: (479) 587-1426

-and-

Bruce W. Freeman
D. Richard Funk
CONNER & WINTERS, L.L.P.
4000 One Williams Center
Tulsa, OK 74172
Telephone: (918) 586-5711
Facsimile: (918) 586-8553

ATTORNEYS FOR SIMMONS FOODS, INC.

BY: */s/ Robert P. Redemann*

(SIGNED BY FILING ATTORNEY WITH PERMISSION)

Robert P. Redemann, OBA #7454
PERRINE, MCGIVERN, REDEMANN,
REID, BERRY & TAYLOR, P.L.L.C.
Post Office Box 1710
Tulsa, OK 74101-1710
Telephone: (918) 382-1400
Facsimile: (918) 382-1499

-and-

Robert E. Sanders
Stephen Williams
YOUNG WILLIAMS P.A.
Post Office Box 23059
Jackson, MS 39225-3059
Telephone: (601) 948-6100
Facsimile: (601) 355-6136

ATTORNEYS FOR CAL-MAINE FARMS, INC. AND CAL-MAINE FOODS, INC.

BY: */s/ John H. Tucker*

(SIGNED BY FILING ATTORNEY WITH PERMISSION)

John H. Tucker, OBA #9110
Theresa Noble Hill, OBA #19119
RHODES, HIERONYMUS, JONES, TUCKER & GABLE, PLLC
100 W. Fifth Street, Suite 400 (74103-4287)
P.O. Box 21100
Tulsa, Oklahoma 74121-1100
Telephone: (918) 582-1173
Facsimile: (918) 592-3390

-and-

Delmar R. Ehrich
Bruce Jones
Krisann C. Kleibacker Lee
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
Telephone: (612) 766-7000
Facsimile: (612) 766-1600

ATTORNEYS FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC

CERTIFICATE OF SERVICE

I certify that on the 15th of May, 2009, I electronically transmitted the attached document to the court's electronic filing system, which will send the document to the following ECF registrants:

W. A. Drew Edmondson, Attorney General	drew_edmondson@oag.state.ok.us
Kelly Hunter Burch, Assistant Attorney General	kelly_burch@oag.state.ok.us
J. Trevor Hammons, Assistant Attorney General	trevor_hammons@oag.state.ok.us
Tina L. Izadi, Assistant Attorney General	tina_izadi@oag.state.ok.us
Daniel Lennington, Assistant Attorney General	daniel.lennington@oak.ok.gov
Douglas Allen Wilson	doug_wilson@riggsabney.com,
Melvin David Riggs	driggs@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com
Sharon K. Weaver	sweaver@riggsabney.com
David P. Page	dpage@riggsabney.com
Riggs Abney Neal Turpen Orbison & Lewis	
Robert Allen Nance	rnance@riggsabney.com
Dorothy Sharon Gentry	sgentry@riggsabney.com
Riggs Abney	
J. Randall Miller	rmiller@mkblaw.net
Louis W. Bullock	lbullock@bullock-blakemore.com
Michael G. Rousseau	mrousseau@motleyrice.com
Jonathan D. Orent	jorent@motleyrice.com
Fidelma L. Fitzpatrick	ffitzpatrick@motleyrice.com
Motley Rice LLC	
Elizabeth C. Ward	lward@motleyrice.com
Frederick C. Baker	fbaker@motleyrice.com
William H. Narwold	bnarwold@motleyrice.com
Lee M. Heath	lheath@motleyrice.com
Elizabeth Claire Xidis	cxidis@motleyrice.com
Ingrid L. Moll	imoll@motleyrice.com
Motley Rice	
COUNSEL FOR PLAINTIFFS	
Stephen L. Jantzen	sjantzen@ryanwhaley.com
Patrick M. Ryan	pryan@ryanwhaley.com
Paula M. Buchwald	pbuchwald@ryanwhaley.com
Ryan, Whaley & Coldiron, P.C.	
Mark D. Hopson	mhopson@sidley.com

Jay Thomas Jorgensen jjorgensen@sidley.com
Timothy K. Webster twebster@sidley.com
Gordon D. Todd gtodd@sidley.com
Sidley Austin LLP

Robert W. George robert.george@tyson.com

Michael R. Bond michael.bond@kutakrock.com
Erin Walker Thompson erin.thompson@kutakrock.com
Kutak Rock LLP
COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.; AND COBB-VANTRESS, INC.

R. Thomas Lay rtl@kiralaw.com
Kerr, Irvine, Rhodes & Ables

Jennifer S. Griffin jgriffin@lathropgage.com
Lathrop & Gage, L.C.
COUNSEL FOR WILLOW BROOK FOODS, INC.

Robert P. Redemann rredemann@pmrlaw.net
Lawrence W. Zeringue lzeringue@pmrlaw.net
David C. Senger dsenger@pmrlaw.net
Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC

Robert E. Sanders rsanders@youngwilliams.com
E. Stephen Williams steve.williams@youngwilliams.com
Young Williams P.A.
COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.

George W. Owens gwo@owenslawfirmpc.com
Randall E. Rose rer@owenslawfirmpc.com
The Owens Law Firm, P.C.

James M. Graves jgraves@bassettlawfirm.com
Gary V. Weeks
Paul E. Thompson, Jr. pthompson@bassettlawfirm.com
Woody Bassett wbassett@bassettlawfirm.com
Jennifer E. Lloyd jlloyd@bassettlawfirm.com
Bassett Law Firm
COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.

John R. Elrod jelrod@cwlaw.com
Vicki Bronson vbronson@cwlaw.com
P. Joshua Wisley jwisley@cwlaw.com
Conner & Winters, P.C.

Bruce W. Freeman — bfreeman@cwlaw.com
D. Richard Funk
Conner & Winters, LLLP
COUNSEL FOR SIMMONS FOODS, INC.

John H. Tucker — jtuckercourts@rhodesokla.com
Leslie J. Southerland — ljsoutherlandcourts@rhodesokla.com
Colin H. Tucker — chtucker@rhodesokla.com
Theresa Noble Hill — thillcourts@rhodesokla.com
Rhodes, Hieronymus, Jones, Tucker & Gable

Terry W. West — terry@thewesetlawfirm.com
The West Law Firm

Delmar R. Ehrich — dehrich@faegre.com
Bruce Jones — bjones@faegre.com
Krisann Kleibacker Lee — kklee@baegre.com
Dara D. Mann — dmann@faegre.com
Todd P. Walker — twalker@faegre.com
Faegre & Benson LLP
COUNSEL FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC

Michael D. Graves — mgraves@hallestill.com
D. Kenyon Williams, Jr. — kwilliams@hallestill.com
COUNSEL FOR POULTRY GROWERS

William B. Federman — wfederman@aol.com
Jennifer F. Sherrill — jfs@federmanlaw.com
Federman & Sherwood

Charles Moulton — charles.moulton@arkansag.gov
Jim DePriest — jim.depriest@arkansasag.gov
Office of the Attorney General
COUNSEL FOR THE STATE OF ARKANSAS AND THE ARKANSAS NATURAL RESOURCES COMMISSION

Carrie Griffith — griffithlawoffice@yahoo.com
COUNSEL FOR RAYMOND C. AND SHANNON ANDERSON

Gary S. Chilton — gchilton@hcdattorneys.com
Holladay, Chilton & Degiusti, PLLC

Victor E. Schwartz — vschwartz@shb.com
Cary Silverman — csilverman@shb.com
Shook, Hardy & Bacon, LLP

Robin S. Conrad — rconrad@uschamber.com

National Chamber Litigation Center, Inc.
COUNSEL FOR AMICI CURIAE CHAMBER OF COMMERCE FOR THE U.S. AND THE AMERICAN TORT REFORM ASSOCIATION

Richard C. Ford — fordr@crowedunlevy.com
LeAnne Burnett — burnettl@crowedunlevy.com
Crowe & Dunlevy
COUNSEL FOR AMICUS CURIAE OKLAHOMA FARM BUREAU, INC.

M. Richard Mullins — richard.mullins@mcafeetaft.com
McAfee & Taft

James D. Bradbury — jim@bradburycounsel.com
James D. Bradbury, PLLC
COUNSEL FOR AMICI CURIAE TEXAS FARM BUREAU, TEXAS CATTLE FEEDERS ASSOCIATION, TEXAS PORK PRODUCERS ASSOCIATION AND TEXAS ASSOCIATION OF DAIRYMEN

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

J.D. Strong
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118
COUNSEL FOR PLAINTIFFS

Dustin McDaniel
Justin Allen
Office of the Attorney General of Arkansas
323 Center Street, Suite 200
Little Rock, AR 72201-2610
COUNSEL FOR THE STATE OF ARKANSAS AND THE ARKANSAS NATURAL RESOURCES COMMISSION

___/s/ *Jay T. Jorgensen*_____